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September 8, 2023

The Honorable Commissioners
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711-3326

RE: PUC Docket No. 50788 – Ratepayers Appeal of the Decision by
Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates

Dear Commissioners:

The Texas Rural Water Association (“TRWA”) is a statewide educational and trade association that represents over 800 retail public utilities that serve over three million Texans, over half of which are water supply corporations (“WSCs”), and an additional 150 associate members representing all facets of the water and wastewater industry. TRWA has closely followed the above-referenced matter pending before the Public Utility Commission of Texas (“Commission” or “PUC”), and respectfully submits this letter in support of the Proposal for Decision (“PFD”) issued by the Administrative Law Judges (“ALJs”). The outcome of this case may set a precedent that is of statewide importance to our water supply corporation members. TRWA provides the following information for the Commission to consider in this matter:

1. Windermere Rate Appeal Case Background.

Windermere is a member-owned non-profit water supply and sewer service corporation (WSC) that serves approximately 271 active connections. Windermere is managed by a member-elected board of volunteer directors who are also Windermere members and customers. In 2019, Windermere’s board was sued by a faction of Windermere’s ratepayers (“Ratepayer Faction”) over a 2015 sale of corporate land to a former board member. That same year, the Ratepayer Faction served Windermere with over 40 public information requests, Windermere became involved in two additional related lawsuits, and Windermere incurred extensive legal expenses.

Windermere's insurance provider refused to pay for Windermere's legal defense. Windermere sued its insurance company for denying its claim. In 2020, Windermere raised its rates to finance its legal expenses while maintaining normal operations. Windermere's monthly base rate increased from \$50.95 to \$90.39 for water (Approx. \$40 increase), and from \$40.12 to \$66.41 for sewer (Approx. \$25 increase).

On April 27, 2020, the Ratepayer Faction appealed Windermere's rate increase to the PUC claiming that it was unreasonable for Windermere to include its legal fees expended in defending itself against the Ratepayer Faction's lawsuits in its rates.¹ PUC Staff sided with the Ratepayer Faction arguing that Windermere's recovery of its legal fees through its rates was unreasonable.² On 3/31/22, approximately two years later, the ALJ issued a PFD finding Windermere's rates were not unreasonably preferential, prejudicial, or discriminatory, recommended that the PUC Commissioners dismiss the appeal, and allow Windermere to recover \$345,277.03 in rate case expenses.³ On June 29, 2023, the PUC Commissioners remanded this case back to SOAH for further hearing to determine if Windermere's rates were reasonable.⁴

During the second contested case hearing, PUC Staff again sided with the Ratepayer Faction and argued that Windermere's recovery of its legal fees through its rates was unreasonable.⁵ On 6/29/23, two ALJs found that it was reasonable for Windermere to include its legal expenses in its base rates finding, "the evidence overwhelmingly shows that Windermere could not have avoided the legal expenses to defend itself and its directors."⁶

During the PUC contested case proceedings, the Ratepayer Faction served Windermere with 9 sets of Requests for Information (RFIs) that included 210 questions. PUC staff served Windermere with 8 sets of RFIs that included 82 questions. Throughout this process, Windermere incurred up to \$1.78 million in legal fees,⁷ including \$478,184.08 incurred defending this rate appeal matter. If these rate case expenses are paid over the ALJ recommended 42-month period, the surcharge to

¹ Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates Filed 4/27/2020.

² Commission Staff's Initial Brief filed 1/25/22.

³ SOAH Proposal for Decision Filed 3/31/22.

⁴ Order Remanding Proceeding filed and signed 6/30/22.

⁵ Commission Staff's Initial Brief on Issues Addressed in the Second Hearing on the Merits, Filed 4/11/23.

⁶ SOAH Proposal for Decision with Memorandum Filed 6/29/23, Pg. 30.

⁷ Windermere incurred the following annual legal debt: 2019: \$121,619.17; 2020: \$289,385.18; 2021: \$282,676.49; 2022: \$91,647.43; and 2023: \$12,908.30.

be paid by Windermere customers to cover the rate case expenses incurred in this case would be approximately \$42 per month, \$2 more than the original water rate increase.

All Windermere's board members were absolved of wrongdoing by the courts, except the former board member who purchased the disputed property who was ordered to pay \$70,000.⁸ The liable former board member was also required to reimburse Windermere \$50,000 for the legal fees Windermere expended on her behalf.⁹ Windermere also won its appeal against the Texas Attorney General's office protecting privileged information sought to be acquired by the Ratepayer Faction. Windermere also prevailed in its suit against its insurance company for denying coverage and won an award of just over \$650,000.¹⁰ Windermere has recovered approximately \$700,000.00. Windermere is still in the red with over 1 million dollars in attorney's fees from the Ratepayer Faction lawsuits and this rate appeal proceeding combined.

2. The WSC's Elected Board of Directors is Charged with Exercising Discretion on Legal Expenditures

TRWA is particularly concerned about the PUC Staff's argument that the Commission should deny Windermere's recovery of its legal expenses because it was not reasonable for Windermere to incur the legal expenses. In essence, PUC Staff is arguing that the Commission should substitute its judgment for Windermere's elected Board of Directors in deciding whether Windermere should have retained counsel and mounted a legal defense to the Ratepayer Faction lawsuits. TRWA does not support unfettered spending; however, when a WSC is sued, or otherwise faces contentious legal matters, the WSC's elected board is specifically authorized by Texas Water Code Section 67.013 to, "employ and compensate counsel to represent the corporation as the board determines is necessary."¹¹ The PUC should not play second day quarterback and decide whether a WSC's board was justified in retaining legal counsel and incurring legal fees. This is not contemplated, or authorized, by Texas Water Code §§ 13.043 or 13.183.

TRWA is not aware of any previous rate appeal case where PUC Staff recommended that the Commission substitute its judgment for that of a WSC's elected Board of Directors for this type

⁸ HOM 2 Tr. at 776, 10-17 (Gimenez Cross) (Mar. 22, 2023). 40 Windermere Ex. 26 at 12.

⁹ Id., see also, Windermere Ex. 26 at 12.

¹⁰ Windermere Ex. 26 at 12.

¹¹ Texas Water Code Section 67.013

of issue. TRWA respectfully requests that the Commission not set new precedent by doing so in this case. While an analysis of the utility's total revenue requirements, and the expenditures that form the basis for customer rates, is generally subject for review under Texas Water Code §§ 13.043 or 13.183, it is distinguishable from the Commission substituting its discretion for the WSC's elected board in deciding whether to retain counsel and mount a legal defense. A PUC ruling setting new rates by restructuring the budget line items for incurred legal expenses approved by a legally elected WSC Board of Directors would establish a concerning new Commission precedent.

This is not the correct venue for Windermere ratepayers to express their disagreement with Windermere's elected Board of Directors. Windermere's board is elected by its members/customers. Therefore, as with all WSCs, the Windermere's membership dictates the utility's direction. If the membership disagrees with a discretionary decision of the board, it can seek removal of the board members or elect new board members. There have been several election cycles during the pendency of this matter, and the original board that authorized the disputed land sale is no longer in office. Many different legally elected Windermere board members have continued to make the decision to incur legal fees in defense of Windermere. The PUC should not now seek to substitute its judgement for all these legally elected Windermere board members.

3. There is No Authority to Require that a Utility Pay for Budgeted Items Through Loan Proceeds or the Sale of Assets

It is also concerning to TRWA that PUC Staff recommends that Windermere pay for its legal expenses, not through water and sewer rate revenues, but instead by using loan proceeds from its CoBank Loan and by selling its real estate assets.¹² Such a recommendation is unprecedented and is inconsistent with Texas Water Code § 13.043. There is no explicit, or implied, authority in Chapter 13 of the Texas Water Code that would authorize the Commission to compel a utility to

¹² Commission Staff's Initial Brief on Issues Addressed in the Second Hearing on the Merits, filed 4/11/23, page 8; See also, Commission Staff's Exceptions to The Proposal for Decision, Filed August 3, 2023 pg. 22-24.; See also, In her Direct Testimony, Maxine Gilford states that Windermere did not "provide evidence in its direct case that demonstrates recovery of outside legal expenses is necessary to preserve its financial integrity" because, among other things, "Windermere is pre-approved for additional debt of up to \$300,000 from CoBank." Windermere Ex. 4, Direct Testimony of Maxine Gilford at 16 (May 5, 2021) (Gilford Direct).

use loan money, or to sell assets, such as land, to cover its expenditures. Further, this would require Windermere to breach its contractual obligations with CoBank.

Windermere obtained the CoBank loan to, “a) finance various capital expenditures; b) refinance indebtedness to First United Bank and Trust; and c) purchase a new clarifier/pre-treatment tank and UV treatment equipment.”¹³ Staff’s recommendation that Windermere use these loan proceeds to pay its legal expenses directly conflicts with the CoBank loan’s covenants.¹⁴ Further, forcing a utility to sell its land to fund legal fees undermines a utility’s future financial stability. Windermere may need the land to drill a well, or expand their facilities, property which may not be available for them to purchase in the future when it is needed. Moreover, arbitrarily assigning other revenue sources beyond rates is inherently detrimental, especially when the identified potential revenue sources is prohibited to be used in the manner supported by PUC Staff or is needed by the utility for a future purpose.

4. The PUC rate appeal process is unnecessarily long, expensive, and complicated for small WSC(s), cities and districts and should be limited in scope like Class D IOU rate cases.

Windermere amassed almost half a million dollars in rate case expenses defending this case. There were no limits placed on discovery, filings, or the length of the proceeding. This tiny water supply corporation was embroiled in this rate case for more than 3 years, required to participate in two contested case hearings, and required to answer a combined 17 sets of RFIs with 292 questions from the Ratepayer Faction and Staff. This is excessive for a system of this size run by a volunteer board and one part time employee.

Like Class D Investor-Owned Utility Rate Cases (“IOU cases”), small WSC, city and district rate appeals should be limited in time and scope and have limited discovery. A resolution of this issue doesn’t require a statutory or rule change. The PUC may implement a limited procedural schedule in rate appeal cases with entities that serve less than 500 connections.

The PUC procedures enabled the Ratepayer Faction, a small percentage of members, to severely worsen the financial position of this WSC. Now all the members will have to pay a high

¹³ Windermere Ex. 8. Rebuttal Testimony of Mike Nelson at pg. 6. Line(s) 5-10.

¹⁴ Id.: stating, Windermere, “must use these funds as expressly provided in the loan covenants and cannot pay for outside legal expenses with them.”

surcharge to cover the exorbitant rate case expenses incurred in this rate appeal, in an amount which is more than the original water rate increase.

5. Conclusion and Prayer

The Windermere Oaks WSC community experienced internal conflicts due to differences of opinion about decisions made by its elected board. The Ratepayer Faction exhausted all other remedies—both through litigation and the election process—and were then able to use the Commission’s rate appeal process as a new forum to try to resolve these local disputes in their favor. The record reflects that the very legal expenses the Ratepayer Faction contests are attributable to the lawsuits brought by this same group. Creating a new standard where the Commission substitutes its discretion for that of an elected board that voted to hire legal counsel to defend a lawsuit would be bad policy and adversely affect all water supply corporations, and their members. For all the reasons set forth above, TRWA respectfully requests that the Commission adopt the PFD as submitted by the two ALJs. Further, TRWA respectfully requests that the Commission consider adopting a new policy to limit the scope of small retail public utility rate appeals so that the ratepayers are not overly burdened financially by a PUC proceeding.

Thank you for your consideration of this letter, and please let me know if you have any questions.

Respectfully submitted,

Mary Alice Boehm-McKaughan

Mary Alice Boehm-McKaughan
Assistant General Counsel